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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

eptomatters@glenn-law.com

Office Action Summary

Application No.

10/690,145

Applicant(s)

QUIGLEY ET AL.

Examiner

ERIC T. WONG

Art Unit

3693

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 08 September 2009.
2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-20, 22-42 and 44-80 is/are pending in the application.
4a) Of the above claim(s) _____ is/are withdrawn from consideration.
5) ☐ Claim(s) _____ is/are allowed.
6) ☒ Claim(s) 1-20, 22-42 and 44-80 is/are rejected.
7) ☐ Claim(s) _____ is/are objected to.
8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SF/08)
Paper No(s)/Mail Date _____
4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____

DETAILED ACTION

Claim Status

1. Claims 1-20, 22-42, 44-80 are pending. Claims 1, 23, and 50 are currently amended.

Claim Rejections - 35 USC § 103

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all

obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. Claims 1-6, 10-11, 23-28, 32-33, 50-56, 60-61 rejected under 35 U.S.C. 103(a) as being unpatentable over "Random Deposit" ("Online Payments Raising Host of Unresolved Issues", cited in prior Office action).
4. Regarding claim 1, "Random Deposit" teaches providing an account, the account a first account type (unverified account) providing a first set of services (receiving payments), the first set of services requiring a first level of authentication (username/password); presenting an accountholder a one-time challenge/response mechanism (random deposit method); and if the accountholder clears the challenge, converting the account to a second account type for all time (verified account); wherein the second type provides the first set of services (receiving payments) plus further services associated therewith (funding payments), the further services

requiring at least one further level of authentication (random deposit method); wherein the first account type comprises a thin wallet, the thin wallet comprising a record in a subscriber database, and wherein the second account type comprises a full wallet, the full wallet comprising a record in a wallet database. "Random Deposit" states that a verified account is needed to fund payments while an unverified user can still received payments. Therefore, an unverified account is a first account type which is a "thin wallet" and a verified account is a second account type which is a "full wallet".

5. Applicant acknowledges that the practitioner of ordinary skill might reasonably suppose that Random Deposit involves some sort of database, but asserts that there is no explicit, implicit, or inherent description of any particular database structure (see page 18 of Remarks filed 9/8/2009). Examiner disagrees with Applicant and asserts that some sort of database structure is inherent in the Paypal system. Moreover, since both balance information and subscriber information are stored in a database, Paypal discloses at least a wallet database and a subscriber database (the databases may refer to the same database).

6. While Paypal discloses at least one database, Paypal does not explicitly disclose a wallet database which is distinct from said subscriber database. Examiner notes the claim is currently amended to include this limitation. While Paypal does not explicitly disclose this database structure, it would have been obvious to one of ordinary skill in the art at the time of the invention to have modified Paypal to include separate databases for storing different parts of similar data, and performing similar (as well as highly-interwoven) functionality. That is, it would have been obvious to have modified Paypal to include separate databases for storing the thin wallet information and full wallet information.

7. Absent evidence of new or unexpected results, it is not inventive in terms of patentability to take one or more clients or servers ($S_1, S_2, S_3, \dots S_N$) which perform one or more tasks ($T_1, T_2, T_3, \dots T_N$) and add (or subtract) an additional number of servers (X) to perform all or part of the same tasks by allocating the tasks between the various clients and servers (i.e. S_1 and S_{N+1} perform T_1 ; S_2 and S_{N+2} perform T_2 ; S_3 and S_{N+3} perform T_3 ; ... while S_N and S_{N+X} perform T_N). In this case, the servers are database servers and the tasks include storing the thin wallet and full wallet information. The prior art is replete with examples showing why various client server configurations are desirable¹.

8. In other words, a modification distributing the tasks between various clients and servers (e.g. having multiple servers perform the actions previously performed by a single server) is analogous to making functionality, structure, or actions separable - it is the Examiner's position that when the difference between the claimed invention and the prior art is that the prior art does not explicitly disclose an element as separable, then as a matter of law, it would have been obvious to one of ordinary skill in the art at the time of the invention to make the element separable. See also *In re Dulberg*, 289 F.2d 522, 523, 129 USPQ 348, 349 (CCPA 1961), and MPEP §2144.04.

¹ See e.g. Watson (United States Patent 6,223,209 B1) disclosing distributed satellite world wide web servers containing identical information placed strategically throughout the Internet so as to be close to all potential clients to help reduce traffic bottlenecks; Midgely et. al. (United States Patent 5,592,611 A) disclosing additional servers as a stand-in for a failed server so that client service requests are transparent to the user; Kriegsmann (United States Patent 6,370,580 B2) disclosing multiple servers as secondary web servers to optimize file transfers; Burns et. al. (United States Patent 6,298,373 B1) disclosing cache servers which download content during off-peak hours to reduce traffic bottlenecks; Stiles (United States Patent 6,219,692 B1) which discloses sending essentially identical tasks to multiple servers with differing processing loads to find the most preferred server provider; Zdepski et. al. (United States Patent 5,825,884) disclosing an transactional server for TV networks; Burns et. al. (United States Patent 6,298,373) disclosing how computers are used at clients to increase bandwidth by providing content in downloaded from other computers; How Networks Work (2000, ISBN: 0789724456, Derfler et al), Chapter 17 describing how server based structures benefit from economies of scale in addition to offering security, excellent

9. Regarding claim 2, "Random Deposit" further teaches wherein the challenge/response mechanism requires an accountholder to provide information known only to the accountholder.
10. Regarding claim 3, "Random Deposit" further teaches providing the wallet account comprises either of the steps of: creating the account when making an initial purchase; and creating a record in a subscriber database.
11. Regarding claim 4, "Random Deposit" further teaches wherein subscribers include subscribers to any of: an online services and an ISP (Internet Service Provider).
12. Regarding claim 5, "Random Deposit" further teaches wherein the step of presenting a challenge/response mechanism comprises steps of: requesting a service from within the account of the first type that is only available from within an account of the second type; and prompting the accountholder to provide the information known only to the accountholder.
13. Regarding claim 6, "Random Deposit" further teaches wherein the account comprises an electronic wallet, the first type comprising a thin wallet wherein the first set of services comprises at least one low-risk task requiring a low security level.

14. Regarding claims 10-11, "Random Deposit" teaches authenticating at the first level to gain access to the first account; wherein authenticating at the first level comprises providing a user ID and a first-level password.

15. Regarding claim 50, "Random Deposit" teaches a wallet server; a wallet database; a subscriber database; wherein the wallet server is in communication with the wallet and the subscriber databases; wherein the wallet server is in communication with the wallet and the subscriber databases; and a client in communication with the wallet server, wherein a wallet accountholder requests services from the wallet server; wherein the server includes means for converting the electronic wallet.

16. Regarding claims 23-28, 32-33, 51-56, 60-61, the claims are drawn to a computer readable medium comprising instructions for executing the methods or to systems which perform methods of the method claims addressed above. Therefore, the claims are rejected as being obvious over "Random Deposit" as described above.

17. Claims 45 and 76 rejected under 35 U.S.C. 103(a) as being unpatentable over "Random Deposit" in view of Schell (US Patent 6,477,648, cited in prior Office action).

18. Regarding claims 45 and 76, "Random Deposit" does not explicitly teach accessing an account from a client device previously established as trusted.

19. Schell teaches accessing an account from a client device previously established as trusted (see abstract, MAC address). It would have been obvious to one of ordinary skill in the art at the time of invention to modify the method of converting of "Random Deposit" further with accessing an account from a client device previously established as trusted. One skilled in the art would have been motivated to make the modification for the benefit of increased security.

20. Claims 46-48 and 77-79 rejected under 35 U.S.C. 103(a) as being unpatentable over "Random Deposit" in view of Schell, further in view of Applicant admission of prior art.

21. Regarding claims 46 and 77, "Random Deposit" does not explicitly teach establishing a client as trusted comprises authentication with a second-level password.

22. Applicant admission of prior art teaches establishing a client as trusted by means of authentication with a second-level password (see page 3 of specification starting with "Conventionally, digital wallets..."). It would have been obvious to one of ordinary skill in the art at the time of invention to modify the method of converting of "Random Deposit" further with establishing a client as trusted by authenticating with a second-level password. One skilled in the art would have been motivated to make the modification for the benefit of increased security.

23. Regarding claim 47 and 78, Applicant admission of prior art teaches re-establishing a client as trusted if a trusted state is compromised is old and well known in the art. Examiner

notes that the limitation is taken as Applicant admission of prior art since Applicant did not adequately traverse the Official Notice taken in the prior Office action (see “Response to Arguments” below). Based upon a technical line of reasoning which is clear and unmistakable, if a client is found to be untrusted, it would not only have been obvious to re-establish trust with the client, but expected in order to continue providing services to the customer in a secure fashion. One skilled in the art would have been motivated to make the modification for the benefit of customer satisfaction and maintaining a profit stream.

24. Regarding claim 48 and 79, “Random Deposit” does not explicitly teach providing a visual indicator of a trusted state.

25. Applicant admission of prior art teaches that providing a visual indicator is old and well known in the art (eg. “Login successful message”). Examiner notes that the limitation is taken as Applicant admission of prior art since Applicant did not adequately traverse the Official Notice taken in the prior Office action (see “Response to Arguments” below). It would have been obvious to modify the method of converting of “Random Deposit” further with including visual indicator of a trusted state with motivation being that it is convenient for a user to know whether or not he/she is authenticated with the system.

26. Claims 49 and 80 rejected under 35 U.S.C. 103(a) as being unpatentable over “Random Deposit” in view of Schell, further in view of Alao (US PG-Pub US 20020147645 A1, cited in prior Office action).

27. Regarding claims 49 and 80, “Random Deposit” does not explicitly teach providing a security controls panel that permits accountholders to manage authentication for various online products and sites.

28. Alao teaches providing a security controls panel that permits accountholders to manage authentication for various online products and sites (see paragraph 49). It would have been obvious to one of ordinary skill in the art at the time of invention to modify the method for converting of “Random Deposit” further with providing a security controls panel that permits accountholders to manage authentication for various online products and sites. One skilled in the art would have been motivated to make the modification for the benefit of user control (eg. parental control).

29. Claims 14, 36, 64 rejected under 35 U.S.C. 103(a) as being unpatentable over “Random Deposit” in view of Applicant admission of prior art.

30. Regarding claims 14, 36, and 64, “Random Deposit” teaches configuring the challenge by an account provider, wherein configuring the challenge includes: specifying information requested by the challenge. “Random Deposit” does not explicitly teach specifying a permissible number of response attempts.

31. Applicant admission of prior art teaches that specifying a permissible number of response attempts in a security process was old and well known at the time of invention (eg. Microsoft

Windows password lockout). Examiner notes that the limitation is taken as Applicant admission of prior art since Applicant did not adequately traverse the Official Notice taken in the prior Office action (see “Response to Arguments” below). It would have been obvious to one of ordinary skill in the art at the time of invention to modify the method of converting of “Random Deposit” further with specifying a permissible number of response attempts. One skilled in the art would have been motivated to make the modification to prevent brute force attempts to provide the correct answer.

32. Claims 73-75 rejected under 35 U.S.C. 103(a) as being unpatentable over “Random Deposit” in view of Alao.

33. Regarding claims 73-75, “Random Deposit” does not explicitly teach a second server, said second server operative to relay data and requests between said wallet server and said subscriber database; a router, the router operative to link at least a first and a second network, wherein the wallet server occupies the first network and wherein the second server and the subscriber database occupy the second network; wherein the wallet database occupies said second network.

34. Alao teaches a second server, said second server operative to relay data and requests between said wallet server and said subscriber database; a router, the router operative to link at least a first and a second network, wherein the wallet server occupies the first network and wherein the second server and the subscriber database occupy the second network; wherein the

wallet database occupies said second network (see abstract). It would have been obvious to one of ordinary skill in the art at the time of invention to modify the system of “Random Deposit” to include a second server, said second server operative to relay data and requests between said wallet server and said subscriber database; a router, the router operative to link at least a first and a second network, wherein the wallet server occupies the first network and wherein the second server and the subscriber database occupy the second network; wherein the wallet database occupies said second network. One skilled in the art would have been motivated to make the modification to secure personal information on a separate server.

35. Claims 12-13, 34-35, 62-63 rejected under 35 U.S.C. 103(a) as being unpatentable over “Random Deposit” in view of Alao, further in view of Applicant admission of prior art.

36. Regarding claims 12-13, “Random Deposit” does not explicitly teach wherein the information known only to the account holder comprises at least a portion of a credit card number stored in the first account;

37. Alao teaches wherein the information known only to the account holder comprises at least a portion of a credit card number stored in the first account (see paragraph 75). It would have been obvious to one of ordinary skill in the art at the time of invention to modify the method of converting of “Random Deposit” further with wherein the information known only to the account holder comprises at least a portion of a credit card number stored in the first account.

One skilled in the art would have been motivated to make the modification for the benefit of increased security.

38. "Random Deposit" does not explicitly teach if the accountholder doesn't clear the challenge, allowing a predetermined number of attempts to enter the information known only to the account holder; if the account holder fails the predetermined number of attempts, allowing the account holder to provide a new credit card number; and presenting a challenge based on the new credit card number.

39. Applicant admission of prior art teaches that specifying a permissible number of response attempts in a security process was old and well known at the time of invention (eg. Microsoft Windows password lockout). Examiner notes that the limitation is taken as Applicant admission of prior art since Applicant did not adequately traverse the Official Notice taken in the prior Office action (see "Response to Arguments" below). It would have been obvious to one of ordinary skill in the art at the time of invention to modify the method of converting of "Random Deposit" further with if the accountholder doesn't clear the challenge, allowing a predetermined number of attempts to enter the information known only to the account holder. One skilled in the art would have been motivated to make the modification to prevent brute force attempts at guessing the correct answer.

40. Alao teaches storing multiple credit card numbers for the consumer to choose from (see paragraph 99). It would have been obvious to one of ordinary skill in the art at the time of invention to modify the method of converting of "Random Deposit" further with if the account holder fails the predetermined number of attempts, allowing the account holder to provide a new

credit card number; and presenting a challenge based on the new credit card number. One skilled in the art would have been motivated to make the modification for convenience, i.e. a user may not remember the information to one credit card, but may still remember the information to another.

41. Regarding claims 34-35 and 62-63, the claims are drawn to a computer readable medium comprising instructions for executing the methods or to systems which perform the method of the aforementioned claims.

42. Claims 7-9, 15, 29-31, 37, 57-59, 65 rejected under 35 U.S.C. 103(a) as being unpatentable over "Random Deposit" in view of "User Agreement" ("User Agreement for Paypal Service", cited in prior Office action).

43. Regarding claims 7-9, "Random Deposit" does not explicitly teach wherein the at least one low-risk task comprises any of: making purchases not exceeding a predetermined purchase amount; making transactions using default account information; and making purchases at sites requiring only the first level of authentication; wherein the second type comprises a full wallet and the further rights comprise additional tasks requiring greater security than the low level of security; wherein the additional tasks comprise any of: editing the default account information; editing account preferences; making purchases that exceed a predetermined purchase amount; and making purchases at sites that require the at least one level of further authentication.

44. “User Agreement” teaches wherein the at least one low-risk task comprises any of: making purchases not exceeding a predetermined purchase amount (sending limit on unverified account); making transactions using default account information; and making purchases at sites requiring only the first level of authentication; wherein the second type comprises a full wallet and the further rights comprise additional tasks requiring greater security than the low level of security; wherein the additional tasks comprise any of: editing the default account information; editing account preferences; making purchases that exceed a predetermined purchase amount; and making purchases at sites that require the at least one level of further authentication. It would have been obvious to one of ordinary skill in the art at the time of invention to modify the method of converting of “Random Deposit” with wherein the at least one low-risk task comprises any of: making purchases not exceeding a predetermined purchase amount (sending limit on unverified account); making transactions using default account information; and making purchases at sites requiring only the first level of authentication; wherein the second type comprises a full wallet and the further rights comprise additional tasks requiring greater security than the low level of security; wherein the additional tasks comprise any of: editing the default account information; editing account preferences; making purchases that exceed a predetermined purchase amount; and making purchases at sites that require the at least one level of further authentication. One skilled in the art would have been motivated to make the modification in order to mitigate fraud.

45. Regarding claim 15, "Random Deposit" teaches creating a record in a wallet account database but does not explicitly teach providing notice of a privacy policy; and consenting to the privacy policy by the account holder.

46. "User Agreement" teaches providing notice of a privacy policy; and consenting to the privacy policy by the account holder. It would have been obvious to one of ordinary skill in the art at the time of invention to modify the method of converting of "Random Deposit" with providing notice of a privacy policy; and consenting to the privacy policy by the account holder. One skilled in the art would have been motivated to make the modification for the benefit of protection from liability.

47. Regarding claims 29-31, 37, 57-59, 65, the claims are drawn to a computer readable medium comprising instructions for executing the methods or to systems which perform the method of the aforementioned claims.

48. Claims 16-18, 38-40, 66-68 rejected under 35 U.S.C. 103(a) as being unpatentable over "Random Deposit" in view of "User Agreement", further in view of Applicant admission of prior art.

49. Regarding claims 16-18, "Random Deposit" does not explicitly teach creating a second-level challenge; setting a second-level password; and configuring a security question by the accountholder.

50. Applicant admission of prior art teaches creating a second-level challenge; setting a second-level password; configuring a security question by the accountholder; providing the second-level password; and clearing the security question. (for second-level password see page 3 of specification starting with “Conventionally, digital wallets...”, for security question see page 3 of specification starting discussing hierarchy of queries in US Patent 6,263,447). It would have been obvious to one of ordinary skill in the art at the time of invention to modify the method of converting of “Random Deposit” further with creating a second-level challenge; setting a second-level password; configuring a security question by the accountholder; providing the second-level password; and clearing the security question. (for second-level password see page 3 of specification starting with “Conventionally, digital wallets...”, for security question see page 3 of specification starting discussing hierarchy of queries in US Patent 6,263,447). One skilled in the art would have been motivated to make the modification for the benefit of increased security since it was old and well known in the art to layer different types of security in order to increase overall security.

51. Regarding claims 38-40 and 66-68, the claims are drawn to a computer readable medium comprising instructions for executing the methods or to systems which perform the method of the aforementioned claims.

52. Claims 19-22, 41-42, 44, 69-72 rejected under 35 U.S.C. 103(a) as being unpatentable over "Random Deposit" in view of "User Agreement", further in view of Applicant Admission of prior art, further in view of Alao.

53. Regarding claim 19, "Random Deposit" does not explicitly teach providing a user interface accessible only to holders of accounts of the second type to edit account information and preferences.

54. Alao teaches providing a user interface to holders of accounts to edit account information and preferences (see paragraph 47). It would have been obvious to one of ordinary skill in the art at the time of invention to modify the method of converting of "Random Deposit" further with providing a user interface accessible only to holders of accounts of the second type to edit account information and preferences. One skilled in the art would have been motivated to make the modification for the benefit of increased security.

55. Regarding claim 20, "Random Deposit" does not explicitly teach wherein the account information comprises any of: first name; middle initial; last name; credit card type; credit card number; credit card expiration date; billing address; city; state; postal code; country; daytime phone; and evening phone.

56. Alao teaches wherein the account information comprises any of: first name; middle initial; last name; credit card type; credit card number; credit card expiration date; billing address; city; state; postal code; country; daytime phone; and evening phone (see paragraph 47). It would have been obvious to one of ordinary skill in the art at the time of invention to modify

the method of converting of "Random Deposit" further with wherein the account information comprises any of: first name; middle initial; last name; credit card type; credit card number; credit card expiration date; billing address; city; state; postal code; country; daytime phone; and evening phone. One skilled in the art would have been motivated to make the modification because some of the necessary information to make a purchase may need to be updated.

57. Regarding claim 22, "Random Deposit" teaches providing a wallet server, wherein the wallet server comprises a web server having a wallet application running thereon, the wallet server operative to pull account information from either the subscriber database or the wallet database.

58. Regarding claims 41-42, 44, and 69-72, the claims are drawn to a computer readable medium comprising instructions for executing the methods or to systems which perform the method of the aforementioned claims. The claims are objected as being obvious over "Random Deposit" as described above.

Response to Arguments

59. Applicant argues that the Office makes no showing whatsoever of a database architecture comprising both a subscriber database and a wallet database wherein the wallet database contains full wallet records and the subscriber database contains thin wallet records. Random Deposit is completely silent as to how verified and unverified accounts are stored and/or how they are distinguished from each other. The argument is not found persuasive for the following reasons:

60. As discussed in the rejection of claim 1 above, Applicant acknowledges that the practitioner of ordinary skill might reasonably suppose that Random Deposit involves some sort of database, but asserts that there is no explicit, implicit, or inherent description of any particular database structure (see page 18 of Remarks filed 9/8/2009). Examiner disagrees with Applicant and asserts that some sort of database structure is implicitly described in the Paypal system.

61. Moreover, since both balance information and subscriber information must be stored in a database in order to access a balance, Paypal discloses at least a wallet database and a subscriber database (the databases may refer to the same database). Furthermore, a verified account is a full wallet record and an unverified account is a thin wallet record. Since both verified and unverified account information are stored, Paypal discloses storing both full wallet records and thin wallet records.

62. Applicant states "For the record, Applicant respectfully traverses any and all factual assertions in the file that are not supported by documentary evidence. Such include assertions based on findings of inherency, assertions based on Official Notice, and any other assertions of what is well known or commonly known in the prior art." (see pg. 21 of Remarks).

As per MPEP 2144.03,

C. If Applicant Challenges a Factual Assertion as Not Properly Officially Noticed or Not Properly Based Upon Common Knowledge, the Examiner Must Support the Finding With Adequate Evidence

To adequately traverse such a finding, an applicant must specifically point out the supposed errors in the examiner's action, which would include stating why the noticed fact is not considered to be common knowledge or well-known in the art. See 37 CFR 1.111(b). See also *Chevenard*, 139 F.2d at 713, 60 USPQ at 241

("[I]n the absence of any demand by appellant for the examiner to produce authority for his statement, we will not consider this contention."). A general allegation that the claims define a patentable invention without any reference to the examiner's assertion of official notice would be inadequate. If applicant adequately traverses the examiner's assertion of official notice, the examiner must provide documentary evidence in the next Office action if the rejection is to be maintained. See 37 CFR 1.104(c)(2). See also Zurko, 258 F.3d at 1386, 59 USPQ2d at 1697 ("[T]he Board [or examiner] must point to some concrete evidence in the record in support of these findings" to satisfy the substantial evidence test). If the examiner is relying on personal knowledge to support the finding of what is known in the art, the examiner must provide an affidavit or declaration setting forth specific factual statements and explanation to support the finding. See 37 CFR 1.104(d)(2). If applicant does not traverse the examiner's assertion of official notice or applicant's traverse is not adequate, the examiner should clearly indicate in the next Office action that the common knowledge or well-known in the art statement is taken to be admitted prior art because applicant either failed to traverse the examiner's assertion of official notice or that the traverse was inadequate. If the traverse was inadequate, the examiner should include an explanation as to why it was inadequate.

63. Applicant's statement is an inadequate traversal of the Official Notice taken in the prior Office action because it fails to state why the noticed facts are not considered to be common knowledge or well-known in the art. Therefore, the limitations which were noticed and then construed upon as Applicant admission of prior art are still considered Applicant admission of prior art.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to ERIC T. WONG whose telephone number is 571-270-3405. The examiner can normally be reached on Monday-Friday 9:00AM-5:00PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, James A. Kramer can be reached on 571-272-6783. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/James A. Kramer/
Supervisory Patent Examiner, Art Unit 3693

ERIC T. WONG
Examiner
Art Unit 3693

October 29, 2009